PP

v.

ZAINAL ISMAIL & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: J-06B-12-2006]
5 FEBRUARY 2009

CRIMINAL LAW: *Corruption - Dismissal of conviction, appeal against - Conviction for soliciting money in consideration of not taking action - Whether High Court erred in dismissing conviction entered by sessions court on facts and evidence*

EVIDENCE: *Witness - Credibility of - Whether corroboration required*

This was the Public Prosecutor's appeal against the decision of the High Court reversing the conviction entered against the respondents by the sessions court. The facts were that the respondents solicited sums of money from one Mohamad Azni ('PW6'), a Singaporean, in consideration of not taking action against him for failing to declare dutiable goods entering Malaysia from Singapore. The goods were carried in a lorry driven by PW3. According to PW3, he was approached by the respondents who were customs officers demanding a sum of money from him so as not to take action against him for the non-declaration of the goods at the customs complex in Johor Bahru. PW3 then contacted PW6 who was the owner of the goods concerned. When PW6 arrived at the complex, the respondents made more monetary demands on him. It transpired that PW6 lodged a report with the Anti-Corruption Agency in Johor Bahru the next day and that led to the ambush and arrest of the respondents by the Anti-Corruption Agency officers at a planned meeting. The sessions judge convicted the respondents on four charges and sentenced them accordingly. The respondents appealed to the High Court on the ground that there was no proper evaluation of the evidence of PW3 and PW6 by the sessions judge. The High Court allowed the appeal. The learned judge considered PW3 and PW6 to be accomplices wanting of corroboration. The Public Prosecutor now appealed.

A **Held (allowing the Public Prosecutor's appeal)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) PW3 was not an accomplice. He was not interested in the
B goods that were said to be dutiable and undeclared. He was merely the driver of the lorry in which the goods were carried. He had no interest in the subject matter in the discussion that had taken place. He was merely there as an observer. His role in the whole incident was the fact that a demand had
C been made on him which he promptly conveyed to PW6. His acts and conduct taken as a whole did not render him an accomplice. He did not participate in any offence. Further, it was not reasonable to regard his evidence with suspicion. In addition, PW3 did not fall within that class of persons who
D were at best not reliable witnesses and whose evidence called for corroboration. The approach taken by the sessions judge to the evidence of PW3 was correct. She was entitled to act upon it without requiring any corroboration at all. (paras 7 & 8)

E **(2)** It was plain that PW6 was acting under duress when he negotiated with the respondents and when he went about raising the first payment demanded. It was in evidence that threats had been made against his family. His identity card had
F also been seized. In the circumstances, it could not be said that his conduct when taken as a whole amounted to an "infamous conduct" so as to take him out of the protection of the statute, *ie*, s. 18 of the Act. Further, a witness who participated in an offence under duress ought not to be
G treated as an accomplice. Therefore, PW6's evidence did not require corroboration. Even if it did, there was ample corroboration available on the evidence adduced herein. (paras 9, 10 & 11)

(3) There was no question that the prosecution had, at the close
H of the whole case proved the four charges against the respondents beyond reasonable doubt. The evidence supported the inference that the respondents committed the offence jointly. In the circumstances, a reasonable tribunal armed with the facts and evidence of the case and properly
I directing itself would have arrived at the same conclusion as the sessions judge. (paras 12 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi untuk mengakaskan sabitan responden-responden oleh mahkamah sesyen. Fakta-fakta ialah bahawa responden-responden telah memujuk-rayu duit daripada seorang yang bernama Mohamad Azni ('PW6'), yang merupakan warganegara Singapura, sebagai balasan untuk tidak mengambil tindakan terhadapnya kerana gagal mengisytiharkan barang-barang yang sepatutnya dikenakan duti yang dibawa masuk ke Malaysia dari Singapura. Barang-barang itu diangkut dalam sebuah lori yang dipandu oleh PW3. Mengikut PW3, ia didekati oleh responden-responden yang merupakan pegawai-pegawai kastam yang meminta wang daripadanya untuk tidak mengambil tindakan atas ketidakisytiharan barang-barang itu di kompleks kastam di Johor Bahru. PW3 selepas itu menghubungi PW6 yang merupakan pemilik barang-barang itu. Apabila PW6 sampai ke kompleks, responden-responden membuat permintaan untuk lebih wang ke atasnya. Ia terjadi bahawa PW6 telah membuat suatu laporan dengan Agensi Anti-Rasuah di Johor Bahru pada hari keesokannya dan itu membawa kepada penyerangan hendap dan tangkapan responden-responden oleh pegawai-pegawai Agensi Anti-Rasuah di sebuah pertemuan yang dirancang. Hakim sesyen menyabit responden-responden atas empat tuduhan dan menghukum mereka dengan sewajarnya. Responden-responden merayu ke Mahkamah Tinggi atas alasan bahawa tidak ada pertimbangan keterangan PW3 dan PW6 yang betul oleh hakim sesyen. Mahkamah Tinggi membenarkan rayuan. Yang arif hakim berpendapat saksi-saksi PW3 dan PW6 merupakan rakan-rakan sejenayah yang tidak ada keterangan sokongan. Pendakwa Raya kini merayu.

Diputuskan (membenarkan rayuan Pendakwa Raya)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) PW3 bukan seorang rakan sejenayah. Beliau tidak berminat dengan barang-barang yang dikatakan patut dikenakan duti dan yang tidak diisytiharkan itu. Beliau hanya pemandu lori yang mengangkut barang-barang itu. Beliau tidak mempunyai apa-apa minat dalam subjek perkara dalam perbincangan yang telah diadakan. Beliau hanya di sana sebagai seorang pemerhati. Peranan beliau dalam seluruh insiden itu berasaskan fakta bahawa suatu permintaan telah dibuat ke atasnya di mana beliau telah cepat memberitahu PW6 tentangnya.

A Tindakan dan kelakuan beliau jika dipandang secara keseluruhan tidak menjadikannya seorang rakan sejenayah. Beliau tidak mengambil bahagian dalam apa-apa kesalahan. Lagipun, ia merupakan tidak munasabah untuk mensyaki keterangannya. Tambahan lagi, PW3 tidak termasuk dalam
B kelas saksi-saksi yang tidak boleh diharap di mana keterangan mereka perlu disokong. Pendekatan yang diambil oleh hakim sesyen kepada keterangan PW3 ialah betul. Beliau berhak bertindak atasnya tanpa apa-apa keterangan sokongan.

C **(2)** Ia merupakan jelas bahawa PW6 bertindak di bawah dures apabila beliau berunding dengan responden-responden dan apabila beliau mengumpulkan wang untuk bayaran pertama yang diminta. Keterangan menunjukkan bahawa ugutan-ugutan telah dibuat terhadap keluarganya. Kad pengenalannya pun
D telah diambil. Dalam halkeadaan sebegitu, ia tidak boleh dikatakan bahawa kelakuannya apabila dipandang secara keseluruhan bermaksud "kelakuan dahsyat" yang mengenepikan beliau daripada perlindungan statut, iaitu, s. 18 Akta. Lagipun, seorang saksi yang menyertai suatu kesalahan di bawah dures
E tidak patut dilayan sebagai seorang rakan sejenayah. Oleh itu, keterangan PW6 tidak perlukan sokongan. Jikapun diperlukan, ada banyak keterangan sokongan yang dikemukakan di sini.

(3) Tidak ada apa-apa soalan bahawa pendakwaan telah, pada
F penghujung keseluruhan kes, membuktikan empat tuduhan terhadap responden-responden melampaui keraguan munasabah. Keterangan menyokong inferens bahawa responden-responden telah melakukan kesalahan itu bersama. Dalam halkeadaan itu, suatu tribunal munasabah yang mempunyai fakta-fakta dan
G keterangan kes ini dan yang mengarahkan dirinya dengan betul akan mencapai keputusan yang sama seperti hakim sesyen.

Case(s) referred to:
Chao Chong & Ors v. PP [1960] MLJ 238 ***(foll)***
Daimon Banda v. PP [1953] MLJ 23 ***(refd)***
H *Mahadeo v. R [1936] 2 All ER 813* ***(refd)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(refd)***
Soosay Dass v. PP [1951] MLJ 57 ***(refd)***
Srinivas Mall Bairoliya & Anor v. Emperor AIR [1947] Privy Council 135 ***(refd)***

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Legislation referred to:
Penal Code, s. 34
Prevention of Corruption Act 1961, s. 18

For the prosecution - Azlina Rasdi
For the 1st respondent - Rosli Kamaruddin; M/s Rosli Kamaruddin & Co
For the 2nd respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 3rd respondent - Norah Abu Bakar; M/s Azmi Norah & Assoc

[Appeal from High Court, Johor; Criminal Application No: MT(2) 42-8-2003, 42-16-200 & 42-17-2002]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This is the Public Prosecutor's appeal against the decision of the High Court at Johor Bahru reversing the conviction entered against the respondents by the Sessions Court. The background to this appeal is as follows.

[3] The two respondents before us and one Mohd Aniza Abu Bakar (now deceased) were charged with offences under the Prevention of Corruption Act 1961 (hereinafter referred to as "the Act"). There were four charges in all. In the first charge, the accused persons (for that is what we will call the instant respondents and the deceased accused) were alleged to have solicited the sum of RM3,000 from PW3 (Mageswaran) in consideration of not taking action against him. This offence is said to have taken place on 26 November, 1997 at about 1.30pm at the Customs Complex, Tanjung Puteri, Johor Bahru. In the second charge the three accused are alleged to have solicited a sum of RM10,000 from PW6 (Mohamad Azni bin Abdul Ghani) in order not to take action against him for failing to declare goods entering Malaysia from Singapore. It is alleged that this second offence occurred on 26 November 1997 between 2.30pm to 4.30pm at the aforesaid complex. The third charge alleges that on the same date and time specified in the second charge the accused received a bribe of RM3,000 from PW6 in consideration of not taking action against PW7 for his failure to declare dutiable goods

upon their entry to Malaysia. The fourth charge alleged that on the next date ie, on 27 November 1997 the accused received gratification of RM1,000 from PW6 for the same consideration as set out in the third charge.

[4] The prosecution case as unfolded to the court is as follows. PW6 is a Singaporean. On the date and time in question as set out in the first charge a lorry carrying his goods driven by PW3 arrived at the Customs complex at Tanjung Puteri Johor Bahru. PW3 was accosted by the three accused who alleged that the lorry in question was carrying dutiable goods that had not been declared. According to PW3, whose evidence was accepted by the Sessions Court, a demand was made by the accused for a sum of RM3,000 to overlook the non declaration. PW3 did not have the money and he informed the accused that the goods belonged to PW6 whom he contacted and requested to come to the Customs Complex. PW6 arrived at about 2.30pm at the scene. He was accompanied by his nine year old son Fadhli (PW1) who was 13 years of age when he gave evidence at the trial. The three accused invited PW6 to accompany them to the canteen. PW3 was also present. At the canteen the three accused demanded a sum of RM10,000. PW6 did not have the money with him and said that he would pay only RM3,000. He assured the accused that he would raise the money the following day. The accused then took possession of PW6's identification card (P11) as security to enforce his promise. According to PW6, later the same day, he paid a sum of RM3,000 to the 3rd accused who was seated in a white "Kancil" motorcar. This payment formed the subject matter of the third charge.

The next day PW6 proceeded to the office of the Anti Corruption Agency at Johor Bahru. While he was there he received two phone calls on his mobile telephone demanding the balance sum of RM7,000. It is important to note that one of the calls received by PW6 was in fact overheard by an Anti Corruption Officer PW7 who made a brief note of the conversation.

[5] The next event of importance is a meeting that took place at 9.15pm on 27 November 1997 in front of Johor Bahru Post Office. PW6 and another Anti-Corruption Agency Officer, PW8 who accompanied him were present. Also present were the 1st and 2nd accused. PW8 saw PW6 hand a marked RM1,000 note to the 1st accused. At about that time the 3rd accused appeared from behind saying that he was not satisfied. Upon a pre-arranged

signal being given the Anti-Corruption Agency Officers waiting in ambush surrounded the 1st and 2nd accused and arrested them. Later the 3rd accused surrendered himself to the Anti-Corruption Agency. This, then, is the case for the prosecution

[6] Acting upon this evidence, the learned sessions judge convicted all the three accused on all the four charges and sentenced them accordingly. The accused being dissatisfied with that decision appealed to the High Court Johor Bahru which allowed the appeal and quashed the convictions. The main ground given by the learned High Court judge for reversing the Sessions Court was that there had not been a proper evaluation of the evidence of PW3 and PW6. He considered these witnesses to be accomplices and further held that the sessions court had misdirected itself in acting upon their testimony in the absence of any credible corroboration. The learned deputy has argued that the intervention by the High Court was in error. We think there is merit in her complaint.

[7] In the first place, PW3 whom the learned High Court judge treated as an accomplice was not an accomplice at all. He was not interested in the goods which were said to be dutiable and undeclared. He was merely the driver of the lorry in which the goods were carried. He had no interest in the subject matter in the discussion that took place in the canteen. He was there merely as an observer. His only role in the whole incident was the fact that a demand had been made of him which he promptly conveyed to PW6. His acts and conduct taken as whole does not render him an accomplice. In arriving at this conclusion we are guided by the following passage in the judgment of the Malayan Court of Appeal in *Chao Chong & Ors v. Public Prosecutor* [1960] MLJ 238 at 239:

> It is true that by reason of section 94 of the Penal Code duress is not a defence to a charge of murder, although in at least one case an Indian Court has held that it is a defence to a charge of abetment of murder (see *Umadasi Dasi v. Emperor* AIR [1924] Cal. 1031, 1033). The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted ...

[8] Now apply that here. PW3 did not participate in any offence. Further, having regard to all the circumstances of this case, it is not reasonable to regard his evidence with suspicion. We would also add that PW3 did not fall within that class of persons who are at best not reliable witnesses and whose evidence calls for corroboration, see: *Mahadeo v. R* [1936] 2 All ER 813, 818. For these reasons we are in agreement with the approach adopted by the learned sessions judge to PW3's evidence. She was certainly entitled to act upon it without requiring any corroboration at all.

[9] As for PW6, it is plain that he was acting under duress when he negotiated with the accused and when he went about raising the first payment of RM3,000. It is in evidence that threats had been made against his family. His identity card had been seized. In these circumstances, it cannot be reasonably said that his conduct when taken as a whole amounted to what could be described as "infamous conduct", an expression used by the decided cases to take a witness out of the protection of the statute namely s. 18 of the Act, see *Daimon Banda v. Public Prosecutor* [1953] MLJ 23; *Soosay Dass v. Public Prosecutor* [1951] MLJ 57; *Rattan Singh v. Public Prosecutor* [1971] 1 MLJ 162.

[10] Further, in *Srinivas Mall Bairoliya & Anor v. Emperor* AIR [1947] Privy Council 135 it was held that a witness who participated in an offence under the duress ought not to be treated as an accomplice. Lord Du Parcq said at p139:

> Finally, it was urged that reliance had been placed on the uncorroborated evidence of accomplices. Section 133 Evidence Act, expressly provides that 'an accomplice shall be competent witness against an accused person' and that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice'. No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity: sometimes, as was said by Sir John Beaumont CJ in *Kamal Khan v. Emperor* AIR [1935] Bom 230, the accomplice is 'not a willing participant in the offence but a victim of it'. There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist.

We would therefore, at the risk of repetition, conclude that PW6's evidence did not require corroboration. A

[11] Even if it did, ample corroboration is available in the instant case. First, there was the evidence of PW3, himself an impeccable witness. Second, there is the evidence of PW7 who overheard the telephone conversation in respect of the call received by PW6 at the office of the Anti-Corruption Agency. Third, there is the evidence of PW8 who saw PW6 hand the marked RM1,000 note to the 1st accused. No doubt that note was never found but that is irrelevant. What the 1st accused did with it was for him to explain. All the prosecution was required to do was to present credible corroborative evidence that the note was received by him. That it did. Fourth, there is the presence of the 1st and 2nd accused at the Post Office which confirms the pre-arranged plan to meet them there. B C D

[12] Viewing the evidence as a whole there is no question that the prosecution had, at the close of the whole case, proved the four charges against the accused beyond a reasonable doubt. It is true that s. 34 Penal Code had not been invoked in this case against these accused. But the point now taken before us for the instant respondent was never taken at the trial or at the intermediate appeal. Nevertheless out of abundant caution we would observe that the prosecution had on the totality of the evidence established a joint enterprise among the three accused to commit the offence with which they were charged. Without rehearsing the facts in their entirety, we would refer the following points in the evidence which support the inference that the accused committed jointly. In the first place, the accused were all present when the demand was made of PW3. In the second place, they were all present at the canteen where the conversation took place. The mere fact that one of them chose to receive the RM3,000 and two of them chose to be present at the Post Office does not detract from the inference that they were acting together in their joint enterprise namely to demand and to obtain a gratification. E F G H

[13] In supporting the judgment of the High Court, learned counsel for the instant respondents argued that the presence of his clients at the Post Office and other ancillary facts had been sufficiently explained by the accused when making their defence. However, it is to be observed that the major portion of the I

matters alleged against PW6 was never put to him when he gave evidence. In short the defence story had not been put to the prosecution during its case. It therefore comes as no surprise that the learned sessions judge treated the defence story as a recent invention.

[14] Having read and re read the record provided to us and having scrutinised the evidence with much anxiety we are entirely satisfied that a reasonable tribunal armed with the facts of this case and properly directing itself would have arrived at the same conclusion as the learned sessions judge.

[15] For the reasons already given, we are of the view that this appeal should be allowed. We set aside the orders of acquittal entered by the High Court. The convictions entered and the sentences passed by the sessions court are hereby restored. The respondents shall forthwith be taken into custody and sent to a lawful place of imprisonment.

[16] Before we conclude, we would add that in view of the demise of the 3rd accused, the Public Prosecutor's appeal against him abates.